DOCUMENT RESUME

ED 219 206 RC 013 512

AUTHOR Albin, Sheila A.
TITLE The Role of States in Social Welfare Programs for Indians.
INSTITUTION National Indian Council on Aging, Albuquerque, N. Mex.; Winston & Strawn, Washington, DC.
SPONS AGENCY Administration on Aging (DHEW), Washington, D.C.
PUB DATE 80
GRANT 90-A-989
NOTE 56p.

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS American Indians; Conflict Resolution; Federal Indian Relationship; Federal Legislation; *Government Role; *Reservation American Indians; *Self Determination; *Social Services; State Federal Aid; *State Programs; *Tribal Sovereignty; Trust Responsibility (Government); Welfare Services

ABSTRACT

The state-of-the-art review of delivery of social services to American Indians living on reservations demonstrates that the basic problem is not whether Indians living on reservations are entitled to receive such services, but which government entity will be financially responsible. Chapters cover: (1) legal status of Indians (roots of conflict); (2) trends toward intergovernmentalization; (3) case law on eligibility; (4) barriers to state involvement in delivery of social services; (5) state role in federally funded programs; and (6) representative state programs. Among the recommendations listed for improving social services are that states having significant Indian populations should receive federal assistance for state welfare programs serving Indians, that states should be held accountable for delivery of services to Indians, and that revenues should be based on need rather than on population. Three characteristics needed for solving conflicts are suggested: Indian self-determination and sovereignty be preserved/strengthened; solutions be flexible and involve both state and tribal authorities in the decision-making process; and solutions be individually tailored on a community-by-community basis. Concluding recommendations also provide two approaches to assist in resolution of conflict, i.e., intergovernmental agreements and optional direct funding. (AH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED219206

THE ROLE OF STATES IN SOCIAL WELFARE PROGRAMS FOR INDIANS

Prepared For
NATIONAL INDIAN COUNCIL ON AGING
By WINSTON & STRAWN

This project was supported, in part, by a grant, No. 90-A-989, from the Administration on Aging, Office of Human Development, Department of Health, Education, and Welfare.

Copyright 1980 National Indian Council on Aging
P. O. BOX 2088
Albuquerque, New Mexico 87103

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

✓ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Peggy J. Poss

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

RC01 3512

JUL 1982
RECEIVED
ERIC/CRESS

TABLE OF CONTENTS

Introduction	1
Legal Status of Indians: Roots of Conflict	2
Trend Towards Intergovernmentalization	5
Case Law on Eligibility	9
Barriers to State Involvement in the Delivery of Social Services	17
State Role in Federally Funded Programs	25
Representative State Programs	31
Recommendations	45
Conclusion	52

INTRODUCTION*/

This paper considers the role which states play in the delivery of social welfare programs to Indians living on federal reservations. The focus is on receipt of such services by Indians living on reservations because this is the area of conflict. In addition to discussion of programs the states have developed and funded themselves, it is important to consider the role which states have in the administration of federally funded social welfare programs.

This paper begins with a brief review of the legal status of Indians from the points of view of both the federal and state governments. In order to understand the present conflicts, an historical perspective is helpful. In addition, general trends in the relationship of state and local governments to the federal government will be considered because of their effect on the present conflict between states and their Indian citizens. Case law dealing with the eligibility of Indians to participate in state programs is enlightening, not only because it establishes the rights

---

*/ The primary author of this paper was Sheila A. Albin.

of Indians as citizens of the states in which they reside, but highlights the fact that states and their Indian citizens have often had to resort to litigation in order to resolve the vagueness of their relationship. Before discussing the programs and activities of representative states, this paper will review the reasons which are generally given for the failure of states to provide social welfare programs and services for Indians. The role of states in federally funded programs and the participation of Indians in state funded programs will be discussed in relation to the problems which each presents. Finally, this paper will discuss some of the major efforts to resolve the problems in this area at this time.

LEGAL STATUS OF INDIANS: ROOTS OF CONFLICT

More has been written about the relationship of the federal government to Indians than the relationship between states and Indians. There is a great variance among states on the extent of jurisdiction they exercise and the law in this area has remained unsettled. In part, this is because federal authority over Indian affairs is exclusive. Even so, Indian citizens, just as their fellow non-Indian citizens, often come into contact

with governmental authority on a state or local basis. The often conflictual relationship between the states and Indians has its roots in the exclusive federal authority which gives Indians a unique legal status.

By adoption of the United States Constitution, the states surrendered certain areas of governmental authority. Among those areas, the states agreed that the United States Congress would have the authority to regulate commerce with Indians[1/] and that the President would have the authority to make treaties with the consent of the Senate.[2/] Judicial interpretation, from early times to the present, has been that, under the provisions of the Constitution, the federal government has exclusive authority over Indian affairs and the states have only such power as is extended by the federal government.[3/] In addition to the exclusion of states from Indian affairs on the basis of constitutional authority, the doctrine of tribal sovereignty provides that Indian tribes possess those powers of self-government that have

---

1/ U.S. Const. art. I, § 8, cl. 3.

2/ U.S. Const. art. II, § 2, cl. 2.

3/ Eg., Worcester v. Georgia, 31 U.S. 515 (1832).

not been relinquished or taken from them by congressional act.[4/] The powers of self-government retained by Indian tribes include: establishment of their own government; definition of tribal membership; regulation of domestic relations; collection of taxes; and establishment of tribal laws which may be enforced in tribal courts.[5/] Thus, Indian contact, individually or through tribal authorities, with any governmental authority other than tribal, raises unique questions of self-determination and sovereignty which are not raised for non-Indian citizens.

A major factor in the historically conflictual relations between states and Indians is the vacillation by the federal government on what the relationship of the federal government to the Indians should be. Federal policy has shifted between termination of the special federal relationship, with the concommitant extension of state jurisdiction, and recognition of the federal trust

---

4/ Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).

5/ Legal and Jurisdictional Problems in the Delivery of SRS Child Welfare Services on Indian Reservations, Center for Social Research and Development, University of Denver (1975).

responsibility to foster the sovereign rights of Indian tribes. Thus, while the federal government through its courts continues to reaffirm exclusive federal authority, federal law and programs have shifted responsibility to state and local governments often without the consent or consultation of the affected parties: the states and their Indian citizens.

TREND TOWARDS INTERGOVERNMENTALIZATION

An important trend in recent years, which has had an impact on Indian-state relations, is the increase in the intergovernmentalization of the responsibilities of all levels of government: federal, state, and local.[6/] The traditional federalist system provided for a division of governmental responsibilities between federal and state governments. The federal government was responsible for coordination of national purposes such as defense, foreign relations and various national programs. Relatively autonomous state and local governments supplemented the federal function by having primary responsibilities in such areas as education, law and order, and establishment of judicial systems.

6/ Intergovernmental Grant System: Assessment and Proposed Policies, Advisory Commission on Intergovernmental Relations (1978).

The "new federalism" is in part a result of the intergovernmental grant system. The federal government funds programs which often carry out traditionally local responsibilities, such as social welfare programs and services, while states and local governments remain the prime administrators. There have been dramatic increases in federal aid to state and local governments. Federal aid has become a more important source of revenue for some state and local governments than the traditional sources of sales and property taxes.

State and local governments cannot be as independent because funding requirements are coordinated with national goals. In some cases, this has had the beneficial effect of eliminating local discriminatory practices. However, centralization has also created problems such as lack of accountability and increases in cost and complexity. The complexity of federal assistance programs has often been criticized as a barrier to tribal authorities acting as prime sponsors under these programs and allowing state governments to avoid accounting for the lack of services which reach Indians in federally funded programs.7/

7/ See discussion infra at 50 to 52.

This new federalism is also demonstrated in federal policy on Indian affairs. For example, it is the policy of the Bureau of Indian affairs that states have the responsibility to treat Indians, whether living on or off reservations, the same as non-Indians with regard to the delivery of social services. The Bureau of Indian Affairs and the Indian Health Service view themselves as residual suppliers of services with primary responsibility resting with the states. Many of the services provided to Indians directly by the federal government are provided to non-Indians by state or local governments. While it has been argued that the federal government has primary responsibility for the social welfare needs of Indians because of the federal trust responsibility and the unique legal status of Indians, it has not been established as a matter of legal right and federal Indian policy has generally followed the trend of intergovernmentalization. Thus, even federal agencies charged with the administration of federal Indian policy rely on state and local governments for the provision of services.

While intergovernmentalization presents problems for non-Indians, the trend is significantly more problematical for Indians. Because of their unusual

legal status, Indians relate to three levels of government -- federal, state and local, and tribal -- while non-Indians merely deal with two. Moreover, the vagueness of the legal relationship between Indians and states adds to the difficulty with the result that state and local governments, while relatively willing to recognize the rights of individual Indian citizens, have been unwilling to cooperate with and work through tribal authorities in many instances. At the same time, because much of the administration of federal programs is handled by local and state governments, tribal authorities are forced to deal with them.

An additional problem in Indian-state relations is that state jurisdiction authorized by the federal government varies not only from state-to-state but even within individual states. Thus, discussion of jurisdictional problems must take into consideration the existing patchwork. In addition, discussion should be specific because there is no such thing as an "Indian" attitude toward state government. Different tribes have different attitudes on what kind and degree of interaction with state and local governments will be beneficial to the interests of their tribe and its

members. To some degree, tribal attitudes have been shaped by state attitudes which have varied greatly. Moreover, for some tribes certain areas have remained sensitive and a source of conflict while in other areas states and Indians have been able to cooperate with some success. Thus, while certain problems and their causes are common among the states, the relations between states and Indian tribes and their members have been shaped by individual circumstances.

CASE LAW ON ELIGIBILITY

The issue of whether Indians are entitled to receive state welfare benefits equally with non-Indians first appeared in 1938 in State ex rel. Williams v. Kemp.[8/] The case did not squarely deal with the question of the eligibility of Indians to receive state benefits but involved a dispute as to whether the state or the county in which an Indian resided was responsible "for relief to ward Indians"[9/] from funds under the Social

---

8/ 106 Mont. 444, 78 P.2d 585 (1938).

9/ By ward Indians, the court intended Indians living on reservations. Id. at 586.

Security Act.[10] The court held that the state was responsible for welfare benefits paid to Indians without contribution from the county.[11]

The court noted that in order for a state plan to be approved for federal funds, the state plan must be in accordance with certain federal criteria. Specifically, state plans cannot impose citizenship requirements that would exclude any citizen of the United States from relief benefits. It is interesting to note that this first case assumed, and the proposition has not been challenged since, that Indians living off reservations are entitled to receive state benefits equally with non-Indians.[12]

10/ 42 U.S.C. § 301 et seq. (1976). Under the Social Security Act, state and federal funds are used to provide relief to needy persons who because of age, youth, blindness or other specified handicap cannot maintain themselves. States are not obligated to contribute but may receive federal funds only if state plans meet federal requirements.

11/ 78 P.2d at 588. The court in State Board of Public Welfare v. Board of Commissioners, 193 N.C. 621, 137 S.E.2d 801 (1964), reached a contrary result. The court held that the "fact that some citizens...reside on property which is exempt from taxation does not relieve Swain County from the burden imposed by the legislature." Id. at 803. The state legislature, in electing to participate in the federal social security plan, placed the burden of matching funds in part on the counties.

12/ "As to emancipated Indians, they are entitled to all the rights and privileges of white residents." 78 P.2d at 588.

Arizona v. Hobby[13/] is often cited incorrectly as authority for the proposition that a state may not discriminate against Indians living on a reservation in regard to Social Security benefits. The court never reached the substantive issues of discrimination and eligibility but dismissed the case for lack of jurisdiction. Nevertheless, the case is interesting because of the actions taken by the state of Arizona at the height of the federal termination policy in 1954. The Arizona state legislature enacted a provision which stated that "no assistance shall be payable under such plan [the state plan submitted under Title XIV of the Social Security Act] to any person of Indian blood while living on a federal Indian reservation."[14/] The Social Security Administration disapproved the state plan under the provisions of the Social Security Act on the grounds that it was racially discriminatory and imposed residence requirements as a condition of eligibility. Thus, although the court did not reach the substantive issue, the administrative ruling was that states could not restrict participation by Indians living on a reservation in benefits subsidized by the Social Security Act.

13/ 221 F.2d 498 (D.C. Cir. 1954).

14/ Ariz. Rev. Stat. Ann. § 70-607.

In Acosta v. San Diego County,[15] plaintiff, an Indian living on a federal reservation in San Diego County, brought suit against the Board of Supervisors of San Diego County claiming that, as a resident of the county, she was entitled to certain welfare benefits. The gravamen of the county's argument was that the jurisdiction of the federal government over reservation lands is exclusive and that Indians living on the reservation are not residents of the county. The court stated that Indians "are not 'wards' of the [federal] government in the sense that they are incompetent to acquire a residence in the state" and held that the plaintiff was entitled to receive welfare beneifts from the county.[16] In addition, the court refuted the recurring argument made by states that, because federal reservations are not subject to state property taxes, Indians living on a reservation should not receive the

---

15/ 126 Cal.2d 455, 272 P.2d 92 (1954). The case is discussed in a student case note in 2 UCLA L.Rev. 143 (1954). This note views the decision as correct as a matter of statutory interpretation but as failing to provide a workable solution. The article concludes that, in order to provide a sufficient tax base for the counties, federal assistance is necessary and the direct burden should be on the state rather than the county.

16/ 272 P.2d at 96.

benefits of residency because they do not carry its obligations. The court noted that Indians living on a reservation travel beyond its borders and are, therefore, subject to sales and use taxes just as non-Indian residents. Moreover, other residents who live on tax-exempt lands, such as those owned by religious institutions, or who receive other federal benefits are permitted to receive welfare benefits as residents of the county.

Although, the United States Supreme Court has never directly addressed the question of whether Indians living on a reservation are entitled to receive state benefits, in Ruiz v. Morton,17/ a case involving the responsibilities of the Bureau of Indian Affairs, the Court stated in dictum:

> Any Indian, whether living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which his State participates and no limitation may be placed on Social Security benefits because of an Indian claimant's residence on a reservation.18/

17/ 415 U.S. 199 (1974).

18/ Id. at 208.

The case of County of Beltrami v. County of Hennepin,[19] which involved the residency of four indigent Indian children, is unusual, not only because of the identity of the litigants, but because of the reasoning adopted by the court. The conflict in the case was between two county governments both of which asserted that the children had not acquired "legal settlement" in their respective counties for purposes of county responsibility for payment of poor relief benefits. In part, the case's precedential value is questionable because of the unusual notion of "settlement" in Minnesota welfare laws.[20] Settlement is not equivalent to domicile or residence but may be summarized for discussion here as that place where a resident has resided for two years without receipt of welfare benefits.[21]

The children were born and lived with their mother on a federal reservation in Beltrami County during which time they received public assistance. The children

---

19/ 264 Minn. 406, 119 N.W.2d 25 (1963).

20/ Minn. Stat. § 261.07.

21/ Id.

and their mother later moved to Hennepin County where, shortly thereafter, the mother was adjudged mentally ill and committed for institutional care. From the time that the children lived in Hennepin County, they received public asistance from that county. For some time, the children were cared for by a grandmother but they were later placed in foster care facilities by Hennepin County.

At that time, Hennepin County asserted that, for purposes of determining financial responsibility, Beltrami County was the place of legal settlement. Beltrami County asserted the contrary. The court held that the children could not have acquired legal settlement in Beltrami County when they resided on a federal reservation because such residence is "immune from the jurisdiction of the poor-relief laws by Beltrami County, [and] such residence cannot ripen into settlement in that county."22/

The court, while stating that it was not deciding the question of whether an Indian living on a

---

22/ 119 N.W.2d at 32.

federal reservation is entitled to relief as an unsettled pauper, relied on the lack of general jurisdiction by the county in reaching its conclusion. Although the determination of the court did not deny relief to the Indian children involved, the rationale of the case is disturbing because the implication is that Indians living on a reservation, while considered residents of the state and county, are not entitled to receipt of state assistance on the same basis as non-Indian citizens.

These cases dealing with the delivery of social welfare services to Indians living on a reservation demonstrate that the basic problem is not whether Indians living on a reservation are entitled to receive such services, but which governmental entity will be financially responsible. The conflict is often between counties, between county and state or between a state and the federal government on this issue. Generally, states and local governments have taken the position that, because of the federal trust responsibility to Indians and the tax-exempt status of federal reservation lands, federal funding is necessary in order to have sufficient funds to meet the responsibility.

In 1942, Felix Cohen wrote:

> Some state administrators are unaware that Indians maintaining tribal relations or living on reservations are citizens, or mistakenly assume that they are supported by the Federal Government, and deny them relief. This discrimination in state aid has made more acute the economic distress of many Indians who are poor and live below any reasonable standard of health and decency.23/

Almost forty years later, misconceptions on the part of state and local governments continue to affect the social welfare of Indians living on reservations. The next section will discuss what state and local governments perceive as barriers to state involvement in social welfare programs for Indians.

BARRIERS TO STATE INVOLVEMENT IN THE DELIVERY OF SOCIAL SERVICES

Among the reasons which states assert for their failure to provide full social welfare services to Indians living on reservations are: lack of revenue to support such services because of the tax-exempt status

---

23/ F. Cohen, Handbook of Federal Indian Law 162 (U.N.Mex. 1971).

of Indian real and personal property; lack of jurisdiction which is necessary to provide certain services involving governmental enforcement powers; reluctance to enter into contractual agreements with tribal authorities because tribal authorities may assert sovereign immunity as a defense if litigation results; and reluctance to negotiate intergovernmental agreements on questions of jurisidiction and sovereign immunity because of the unsettled legal status of such agreements under federal law.

Revenue Barrier

Most Indian owned land in states with the larger Indian populations is held in trust by the federal government and is restricted in terms of its sale, lease or use by tribes.[24/] Because the federal government acts as trustee, there is a special responsibility and the federal government performs functions usually performed by state and local government. For example, schools

---

24/ The federal policy for establishing the trust relationship is to help Indians hold onto their land and provide assistance in its development. Historically, white settlers, often abetted by state authorities, encroached on Indian lands and, in part, the role of the federal government as trustee was to preserve reservation boundaries.

administered by the Bureau of Indian Affairs only exist on trust lands and regional offices of the Bureau of Indian Affairs and the Indian Health Service are concentrated in trust land areas.

The fact that reservation lands are exempt under federal law from state taxing authority is not a legal basis by which state or local governments can shed their responsibility to provide social welfare services to their Indian citizens.[25/] Nevertheless, for some state and local governments there are not sufficient financial resources to adequately meet Indian needs. States assert that, even though states and local governments have a general responsibility, the federal government has a special responsibility and role in the provision of services to Indians. This argument is supported by many tribal authorities and Indian organizations. States' attitudes have moved in the direction of accepting greater responsibility provided that there is continued

---

25/ See cases cited notes 8 to 22 supra and accompanying discussion.

federal assistance.[26/] Even though Indian organizations may agree that federal assistance is required, there are significant problems where federal assistance is administered by state governments rather than tribal authorities themselves.[27/]

26/ T. Taylor, The States and Their Indian Citizens 40-47 (Brookings Institute 1972). State policy as reflected by the Governors' Interstate Indian Council recognizes that states have a responsibility to their Indian citizens and that segregation and discrimination have existed. Joint requests by state and tribal authorities for federal financial assistance have been considered as a means of resolving problems of adequate funding.

27/ See discussion infra at pages 25 to 30.

Jurisdiction Barrier

Indians come under the direct jurisdiction of state governments when they leave reservations[28] or when the federal government extends jurisdiction to a state by statute. Extension of jurisdiction to states has been piecemeal and the extent of jurisdiction varies from state-to-state, with respect to different tribes within a state, and with respect to substantive areas of the law. Public Law 280,[29] enacted in 1953, is the major federal statute extending state jurisdiction.[30] It gave civil and criminal jurisdiction to five states and provided for permissive transfer of jurisdiction for other states. An amendment in 1968, provided that further extensions of jurisdiction would require tribal consent and, in addition, that jurisdiction could be retroceded to the

---

28/ There has been a movement of Indians off of reservations into urban areas which parallels the shift in the general populations from rural to urban areas. A major reason for such demographic changes is employment opportunities are greater in the urban areas.

29/ 18 U.S.C. § 1162 (1976) (criminal jurisdiction; 28 U.S.C. § 1360 (1976) (civil jurisdiction).

30/ Oklahoma, New York and Kansas exercise broad jurisdiction over Indian lands on the basis of federal legislation other than P.L. 280.

federal government with the approval of the Secretary of the Interior.[31/]

Public Law 280 gives states the right to apply laws of "general application" but arguably does not authorize the application of all ordinances and regulations of municipal and local governments. Public Law 280 has remained controversial and a source of conflict in Indian-state relations. Litigation has concentrated in three areas: hunting and fishing rights, land use regulations, and taxation. The impetus for enactment of Public Law 280 was largely due to law and order enforcement on reservations, but Public Law 280 did not provide any funding to states to carry out the civil and criminal jurisdiction being transferred. The major impetus for retrocession by states, of some or all of the jurisdiction assumed under Public Law 280, has clearly been economic.[32/]

While some states have submitted that lack of state jurisdiction over Indian reservations is a barrier

---

31/ 25 U.S.C. §§ 1321-26.

32/ Report on Federal, State and Tribal Jurisdiction, Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Commission (Comm. Print 1976).

to provision of social welfare services, it is a spurious argument with regard to the provision of most services. Problems do exist where the exercise of judicial and regulatory authority are required in order to provide needed care. For example, in cases involving commitment of mentally incompetent persons, the placement of children in foster care facilities or licensing of facilities on a reservation, state authorities have been unwilling to give comity to tribal courts and authorities. At the same time, state courts have been unwilling in some instances to give orders authorizing institutionalization of an individual because of lack of jurisdiction. The problem is that a vacuum of authority can exist where a state court will not assert jurisdiction and a tribal court order authorizing commitment in a state institution, which may be the only reasonably available facility, will not be honored. Another factor which compounds jurisdictional problems is that there are many reservations which extend into more than one county and eleven reservations which extend into more than one state.

Sovereign Immunity Barrier

Indian tribes are generally immune from suit.[33/] There is some question whether tribal authorities can waive their sovereign immunity by contract and be subject to suit in state courts. States have asserted that the confusion in this area of the law is a basis for their reluctance to enter into contracts with tribal authorities for the provision of services. Tribal authorities are equally reluctant to enter into a contract or agreement in one area and, thereby, be held to have generally waived their sovereign immunity.[34/]

Federal Jurisdiction Barrier

Agreements between states and tribal authorities for the purpose of negotiating jurisdictional conflicts raise a legal issue as to the general validity of such agreements because of the

---

33/ Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). See generally, Werhan, The Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 1970's, 54 Notre Dame Law. 5 (1978).

34/ In Duluth Lumber and Plywood Co. v. Delta Development, Inc., 281 N.W.2d 377 (1979), the court noted that a distinction can be drawn between contracts entered into by tribal councils and corporations formed by tribal councils to carry out particular functions such as a corporation engaged in housing development. Tribal sovereign immunity would not bar suit against a corporation under a contract containing a waiver and the general sovereign immunity of the tribal council would remain intact.

exclusive federal jurisdiction over Indian affairs. The issue is not tribal sovereignty, as in the case of contracts for services, but whether tribes, acting on their own authority, may extend complete or partial jurisdiction to the states for certain geographic or substantive areas. A number of cases indicate that the only means by which a state can acquire jurisdiction in Indian country is by congressional action.[35/] Therefore, jurisdictional conflicts between states and Indians have necessarily lead to litigation where the parties meet as adversaries, litigation costs drain financial resources, and court rulings only dispose of a narrow issue rather than resolving the general problem.[36/]

STATE ROLE IN FEDERALLY FUNDED PROGRAMS

The Social Security Act is the major federal program which exemplifies the trend in the intergovernmentalization of social welfare programs.[37/]

35/ Bryant v. Itasca County, 426 U.S. 373 (1976); McClanahan v. State Tax Commission, 411 U.S. 164 (1973); Kennery v. District Court, 400 U.S. 423 (1971); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965).

36/ See discussion infra at pages 47 to 49 with regard to proposed federal legislation on this problem.

37/ See note 10 supra and accompanying discussion.

Title XX of the Act provides for a variety of financial assistance and social services programs which are administered by state and local governments. The major purposes of Title XX are to achieve and maintain economic self-sufficiency, prevent neglect or abuse of adults and children unable to protect themselves, prevent or reduce inappropriate institutional care by providing alternatives, securing institutional care when appropriate and providing services to institutionalized individuals. While the federal government has no authority to fund Indian tribes or organizations directly under Title XX, the courts have established that each state must provide services to Indians living on reservations.38/

Present tribal involvement in administration of Title XX funds is limited. The only direct funding to tribes is for research and demonstration grants under sections 1110 and 1115. Some states contract with tribal governments to provide services to Indians living on reservations but this presents problems for both states

---

38/ See notes 8 to 22 supra and accompanying discussion.

and tribal governments because of the contractual nature of the relationship. Problems for tribal governments involved in intergovernmental agreements and contracts include: funding is usually on a reimbursement basis to tribal governments while states receive federal funds in advance; state and local administrative costs use up federal funds before tribal governments receive their portion; and, in order to establish comprehensive programs, tribes must combine various funding sources and coordinate with several funding agencies.

In non-Public Law 280 states, the jurisdictional barriers discussed previously[39/] are asserted as creating problems in delivery of certain services. Even where legal and jurisdictional barriers do not exist, non-legal barriers such as the attitudes of state administrators prevent delivery of services. Although the inability to tax Indian lands is a particularly inappropriate argument where the program is substantially federally funded, states have often stated

---

39/ See discussion supra pages 21 to 23.

they cannot afford the twenty-five percent local share for services to Indians and the tribes, themselves, have had to draw on their own funds in order to participate in Title XX programs.40/

Although Indians are included in the population and per capita income base used in computing state grants, little data is available on actual dollars spent or the number of Indians participating in state administered Title XX programs. Reporting requirements with regard to race are not required. Indians most needful of services often live in areas that are substantial distances from county offices and, in some cases, no services are available.41/ Moreover, even where services are geographically accessible, states have been generally unwilling to develop special programs designed to meet the needs of Indians and to involve tribal authorities in the planning and delivery of

---

40/ Human Resources Department, Indian Research and Demonstration Program, Preliminary Utilization & Policy Paper (1979).

41/ Memorandum of Commissioner Ernest L. Osborne, Human Development Services, Direct Funding of Title XX (July 1979).

services. Thus, for potential Indian recipients, the state-administered programs are inadequate because they are not geared to meet their special needs.

Although there are some substantial issues and problems involved in congressional amendment of Title XX to permit direct funding to tribal organizations, direct funding has proved successful in other programs[42/] and has received the support and approval of federal agencies and Indian organizations.[43/] Direct funding would have the effect of eliminating the inherently conflictual situation which presently exists between Indians and state and local governments. In the delivery of social welfare programs, the importance of having policy and administration in the hands of persons who are culturally sensitive to the needs of program participants is

---

42/ E.g., Comprehensive Employment and Training Act, 29 U.S.C. § 801 et seq.; Older Americans Act, 42 U.S.C. § 3001 et seq.; Indian Health Care Improvement Act, 25 U.S.C. § 1601 et seq.

43/ National Tribal Chairmen's Association, The Feasibility of Direct Funding of Title XX Services To American Indians: Final Report (1979); Indian Child Welfare: A State-of-the-Field Study, Department of Health, Education and Welfare (1976); Legal and Jurisdictional Problems in the Delivery of SRS Child Welfare Services on Indian Reservations, Center for Social Research and Development (1975).

recognized. Direct funding permits programs to be flexible and adapted to meet locally determined needs and conditions. Presently, program criteria and goals, as determined by state and local social welfare agencies, cannot take into consideration individual tribal cultural traits. Thus, federally funded social welfare programs, where administered through state and local governments are predictably inadequate and foster conflict rather than cooperation between tribal governments and state and local agencies.

REPRESENTATIVE STATE PROGRAMS

Many states with substantial Indian populations have some type of special organization or office within the state bureaucracy which deals with at least some aspects of the state's relationship to its Indian citizens. Typically, these offices or commissions are established by the state legislature but are generally understaffed and have limited activites. Their function is often limited to gathering information, acting as a liaison between tribal authorities and state agencies and coordinating local, state, and federal programs. As one writer states, state commissions on Indian Affairs are "frequently an expression of intention rather than fundamental action"[44/] and are often "window dressing."[45/]

Arizona

The Arizona Commission of Indian Affairs, established in 1953, is made up of the following ex officio members: the governor, the superintendent of public instruction, the director of the department of

---

44/ Taylor supra note 26 at 158.

45/ Id. at 104.

health services and the attorney general. The governor appoints nine other members: two non-Indian members appointed at large and seven Indian members from various tribes. Tribal councils submit names of individuals from which the governor selects no more than two from each tribe. The Commission of Indian Affairs has sponsored and issued reports on town hall meetings held for discussion of developments and issues pertinent to state and tribal authorities; has acted as a liaison between the Governor's office and the Inter-Tribal Council of Arizona; publishes a Tribal Directory which lists tribal officials by reservation, Indian associations, Bureau of Indian Affairs' offices, and state and county offices in the areas of education, health and employment; publishes a newsletter summarizing state legislation; and intervenes at the request of federal and state agencies and private organizations in matters where the Commission can provide information or act as a mediator.

As the described activities indicate, the role of the Commission on Indian Affairs is limited to working in a liaison capacity and acting as a source of information. As such, it has had little impact on the historically conflictual relationship between state and local government agencies and tribal authorities. The

Arizona Legislature's Joint Select Committee on Indian Affairs[46/] stated in its review of the Commission:

> The Arizona Commission of Indian Affairs may be viewed as a state agency in name only. Indian leaders and tribes do not generally rely on the Commission in seeking services and information from state government. Although it is organized to promote the welfare of the Indian citizens of this state, the Commission tends to promote the rights of Indians as tribal members rather than the rights of Indians as state citizens. Its philosophy is basically negative towards state government and positive towards tribal government.

The Committee recommended that the function of the Commission be reviewed and that it either be restructured to coordinate with a permanent legislative committee or discontinued.

In Arizona, social welfare programs are primarily administered by the Department of Economic Security, the Department of Health Services and the State Department of Education.

46/ Report of the Joint Select Committee on Indian Affairs, Arizona Legislature (December 1979).

Department of Economic Security funding is a combination of state and federal funds. More than one half of the funds are federal. Services to individual Indians living on reservations are basically the same as those provided to non-Indian, rural residents with the significant exception of services which involve licensing or application of regulations to facilities or which require jurisdiction over individuals. Arizona is a prime example of a state where jurisdictional legal barriers to provision of social welfare services foster conflictual state-tribal relations.

Minnesota

In Minnesota there are seven reservations. The Red Lake reservation is a "closed" reservation over which the state exercises no jurisdiction. All social welfare programs on the Red Lake reservation are provided through the Bureau of Indian Affairs.

Minnesota has jurisdiction over the other six reservations, which comprises ten tribes, under the authority of Public Law 280. In 1952, the tribal councils under joint resolution requested the extension of state jurisdiction. Since that time, there has been some effort towards retrocession.

The Department of Public Welfare is charged with provision of social welfare programs in the state. The Department works through a state-administered county-delivered system. Generally, social welfare programs and services are provided to Indians living on reservation to the same extent as non-Indians in the state. The regional Bureau of Indian Affairs office has termed Minnesota's attitude as unusually progressive.

In the last five years, the county offices have begun to work directly with tribal authorities and have found that Indian participation in programs has increased. Programs which provide services specifically for Indians include: housing, chemical dependency, business loans, summer recreation, weatherization, fuel assistance, and scholarship programs. The Director of Social Services for the Minnesota Chippewa Tribes noted that previously Indians were reluctant to contact county welfare offices because of the removal of children from families. Mutual cooperation has developed in recent years and both state and tribal authorities are enthusiastic about direct funding of social services programs.

The Intertribal Affairs Board is a state agency with a staff of only three persons. Its function, like many such state organizations, is merely to act as a

means of communication between tribal authorities and the state executive and legislative branches. The Board does not take a strong advocacy role and, in contacting various state and tribal offices, few persons were aware of its existence or its function.

Montana

In Montana, the only agency for Indian affairs which is authorized by statute is the Office of State Coordinator of Indian Affairs. The Office is within the Department of Intergovernmental Relations which is part of the Department of Community Affairs. The statute calls for the appointment of an individual by the governor from a list of five persons submitted by the tribal councils of the state. At this time, although four positions are authorized, funding for only two persons has been appropriated. The Coordinator of Indian Affairs meets on a monthly basis with tribes and as requested by individual tribal councils. The function of the Coordinator is to act as representative and spokesman for organized bodies of Indian people and to assist in assessing the problems of Indians and in communicating Indian needs to state agencies. The Coordinator also has a special responsibility to represent Indians living off reservation who may lack any formal tribal affiliation.

The Coordinator will also intervene where conflicts arise between tribal authorities and state agencies.

The present Coordinator stated that one of the main barriers to Indian participation in county and state social services programs is the misconception among county offices that the Bureau of Indian Affairs has primary responsibility for the provision of services to Indians. Generally, Indians living on reservations participate only to a limited extent in state and local programs. Persons with state agencies admitted that there is a problem of establishing "rapport" with tribal councils and members living on reservation. Most social services are provided through the Bureau of Indian Affairs or through direct federal grants to tribal authorities from the Community Services Administration.

The Department of Social and Rehabilitative Services is the state agency charged with the administration of Title XX programs. There is no contracting with tribal authorities for provision of services to Indians living on reservation. Funds under the Older Americans Act are administered by the Bureau of Aging within the Department of Social and Rehabilitative services. There are seven area agencies and one area agency is designated to serve elderly Indians living on reservation. Tribal councils have formed a consortium for purposes of administration of social services and

nutrition programs. The grant formula used in dividing funds is based on population but also considers minority and need factors.

Information on Montana social services and programs for Indians was received through telephone conversation. It is significant that there were no written materials, such as directories of agencies or public information documents, available with the exception of a publication by the Bureau of Aging on programs in the state.

New York

New York has the tenth largest Indian population in the United States according to the 1970 census.47/ New York has full jurisdiction over Indian lands under federal legislation other than Public Law 280.48/ The state has dealt directly with tribal authorities and has provided services to its Indian citizens to a relatively greater degree than other states with significant Indian populations.

The New York Department of Social Services which has primary responsibility for the coordination of

---

47/ Finkell and Ceresia, American Indians in New York State, New York State Department of Social Services, Program Brief No. 2 (April 1978).

48/ 24 U.S.C. § 232 (criminal jurisdiction); 25 U.S.C. § 233 (civil jurisdiction).

services, has its Central Office in Albany and a Regional Office of Native American Services is located in Buffalo. The function of the Office of Native American Services is to coordinate state services to Indians and serve as a liaison between state agencies and tribal groups. It also cooperates with the Bureau of Indian Affairs of the Department of the Interior. Although a major part of the office's work is involved in being a source of information and referral service, its work includes: intervention in decision making of county departments of social services; counselling to individuals on educational opportunities and financial aid; general domestic social work; and employment counselling. The New York social services law includes "any needy Indian or member of his family residing upon any Indian reservation in the State"[49/] in its definition of state charge. Local social services' districts are reimbursed in full by the state for provision of social services to Indians. Home relief, adult institutional care and child welfare services are totally state funded. Other programs funded approximately fifty percent by the federal government are the aid to dependent children and medical assistance programs. Services to the aged,

---

49/ N.Y. Soc. Serv. § 2(21)(b).

disabled and blind are funded under the federal Social Security-Supplemental Security Income Program.

The New York State Education Department provides for the education of Indian children and, in 1973, a special Office on Native American Education was created within the Department. Because tribal lands are tax exempt, tribal authorities contract through the state with local school districts. Thus, the state funds local school districts and is responsible for all tuition and transportation charges. The state receives federal funds under the Johnson-O'Malley Act and Title IV of the Indian Education Act.[50/]

In 1947, the New York State Department of Social Welfare took over the responsibility of serving the health needs of Indians living on reservations from the United States Department of Interior. This responsibility was later transferred to the State Department of Health and, by state statute, this agency has the obligation "to administer to the medical and health needs of the ambulent, sick and needy Indians residing on reservations."[51/] An Indian Health Aide Project operates on three reservations in which federal

---

50/ 25 U.S.C. § 452 and 20 U.S.C. § 241.

51/ N.Y. Pub. Health § 201.

funding is involved.

Social services programs for Indians have been criticized because of a fragmented delivery system and, though staff is capable, there is insufficient staff and direction.52/ The Subcommittee on Indians of the New York State Assembly has noted that the organizational approach of having an Interdepartmental Committee, consisting of nine representatives from various state departments, is ineffective. As an alternative, it has been recommended that each agency which provides services to Indians should have an "Indian Desk." It has been recommended that personnel meet and coordinate Indian services on at least a quarterly basis.

Unlike many states, New York has been directly involved in providing social services to its Indian citizens. Although federal funding provides a significant portion of funding, the state is unusual in its statutory recognition of its responsibility and its general willingness to deal with tribal authorities.

52/ Annual Report of New York State Interdepartmental Committee on Indian Affairs (1974-75).

Oregon

Oregon established a Commission on Indian Services in March 1976 whose purpose is the improvement of services to Indians. The Commission has ten members: one member of the state Senate, one member of the state House of Representatives and eight Indian members from tribal councils and nonreservation areas. Initiative for establishment of the Commission was a result of legislative recognition that state services to Indians had been inadequate, delivery systems were unusable, and that there had been a failure to provide for Indian consultation.[53/] The Commission has four specific responsibilities under its enabling statute: first, to gather information on available social welfare services; second, to make this information available by cooperating with Indian groups and sponsoring information programs; third, to recommend improvements and development of new programs; and, fourth, to report to the state legislature and office of the governor.

53/ First Annual Report of the Commission on Indian Services (Jaunuary 1978).

The Commission has established committees to work on specific problem areas such as children's services, services for the elderly, education, and budget review. The budget committee, in its review of expenditures by state agencies whose programs serve Indians, found that the only state funded program specifically designed to serve Indians was within the State Department of Education. The elderly services committee monitors the state plan on aging and is intended to assist tribal governments in implementation of programs and services for elderly Indians. The Commission has held meetings throughout the state with tribal authorities to assess the needs of their communities. In addition, the Commission has sought to work with federal agencies and the United States Congress, national Indian organizations and multi-state organizations such as the Governors' Interstate Indian Council and the National Conference of State Legislatures.

Oregon's establishment of the Commission on Indian Services in 1976 was a significant step. In its

First Annual Report, the Commission recognized the past failure of Oregon to serve its Indian citizens:

> The Commission on Indian Services embodies the State of Oregon's first commitment recognizing the existence of Indian communities in the state, and establishing a forum for considering their needs.
>
> . . . .
>
> The Commission recognizes that it will not solve many of the problems which Indians in Oregon experience. But the Commission believes that the absence of any suitable mechanism in state government to consider these needs directly has been a significant hurdle in the past. With the Commission's establishment, an initial step has been taken to break down this barrier, and the Commission is dedicated to continuing its efforts to promote increased communication and cooperation among Indians and state government.54/

The Commission's guarded view on what it can endeavor to accomplish is realistic because, like many such state commissions on Indian affairs, the Commission can not provide services itself, nor establish programs or decide what services will be made available. But as one writer

---

54/ First Annual Report of the Commission on Indian Services at 40 (January 1978).

has said, at the least, such commissions are "a foot in the door" and they can be used by state agencies and tribal authorities as a means of reducing conflict and developing mutually beneficial programs.55/

RECOMMENDATIONS

There are certain areas of Indian affairs which should remain federal responsibilities because, by their nature, state involvement would be inappropriate. These areas include: determination of reservation boundaries; water rights; issues involved in individual and tribal land ownership; and settlement of Indian claims. In addition, in the area of social welfare services, states having significant Indian populations residing on trust lands should receive federal assistance for state social welfare programs serving their Indian citizens. While the tax exempt status of trust lands is not a valid legal basis for denying services to Indians, it is a practical problem in terms of the adequacy of financial resources. States receiving federal funding should be held accountable for delivery of services to Indians. Proportional division of revenues for services should

---

55/ Taylor, supra note 26 at 105.

not be determined solely upon the percentage of the state population that is Indian but should factor in the relative needs of Indian groups. Finally, federal rather than state assistance is more appropriate for development of tribal government capabilities because the objective of self-determination is part of the federal trust responsibility.

Solutions to the conflicts existing in Indian-state relations must have three characteristics. First, Indian self-determination and sovereignty must be preserved and strengthened, not diminished, by interaction with state and local governments. Second, solutions must be flexible and allow for involvement of both state and tribal authorities as equals in the decision making process. Federally imposed solutions are doomed to be inadequate if the directly affected governing authorities are not consulted. Moreover, solutions must allow gradual interaction between state and tribal authorities where necessary until historical barriers of distrust and prejudice can be broken down. Third, solutions must be individually tailored to meet problems on a community-by-community basis. Solutions will depend on the needs of the community as it sees them, the historical relationship of state and tribal authorities, the ability of tribal authorities and courts

to be self-sufficient and general factors, such as relative Indian population and the economic resources and development of the individual state.

Two major concepts -- intergovernmental agreements and optional direct funding -- have these three characteristics and are discussed below. Neither alone is a panacea but they offer a good start on resolving some of the recurring problems which have been discussed.

Negotiated Agreements Between State and Indian Governments

Jurisdictional and legal barriers to the provision of social welfare services by states have been a major source of conflict between state and tribal governments. Agreements and contracts between state and tribal governments are of questionable validity because of the exclusive jurisdiction of the federal government over Indian affairs. A recent legislative proposal, S. 1181-"Tribal-State Compact Act of 1979" by Senator Deconcini of Arizona, offers an interesting option which could lead to the improvement of state and Indian government relations. This proposal follows the basic recommendation of the American Indian Policy Review

Commission that states and tribes should enter into a dialogue with each other on a local level in regard to jurisdictional conflicts. S. 1181 would resolve the legal ambiguity of negotiated agreements between tribes and states. The bill would provide federal approval for tribes and state and local governments to enter into agreements on jurisdictional questions such as the application of civil, criminal and regulatory laws on reservations and would permit the transfer of jurisdiction over specific substantive or geographic areas.

S. 1181 also contains provisions which would facilitate the flexibility of such agreements. Either party could terminate an agreement upon six months notice although the agreement could provide for a longer revocation period. Agreements would be filed with the Secretary of the Interior but approval by the Secretary would not be required. Agreements not filed would be revocable without notice. The federal government would be authorized to pay one hundred percent of personnel and administrative costs. In addition, federal funds would be available to tribal authorities to meet expenses involved in negotiation of such agreements.

Federal courts would have jurisdiction for purposes of enforcement and, as was noted in hearings held on the proposal, only parties to the agreement could bring an action.[56/] Thus, third parties would not have standing to attack the agreement for personal reasons. As presently written, S. 1181 presents some areas of concern. One potential problem would be that states may have added leverage in negotiations by being able to force tribes into agreements by withholding certain services or appropriations. Therefore, it was noted during hearings on the proposal that the legislation should make it clear that the objectives of tribal sovereignty and self-determination are to be in no way diminished by the bill.[57/]

In summary, the greatest, potential advantage of the approach offered in S. 1181 is that it seeks to resolve problems on a local level and gives authority to reach necessary resolutions in the hands of those affected. Because it is voluntary, it allows states and tribal authorities to avoid litigation and shape solutions to meet the conflicts on a community level.

56/ Hearing on S. 1181 Before the United States Senate Select Comm. on Indian Affairs, 96th Cong., 1st Sess. 25 (1979).

57/ Id. at 15.

Direct Funding to Tribal Authorities

There are four major reasons for favoring direct funding of federal assistance programs: first, there are significant legal and practical barriers to state-tribal contracting or direct state provision of services to Indians living on reservations; second, many states have failed to provide services on an equal basis or to consider the special needs of Indian recipients; third, direct funding would further the objective of tribal self-determination and permit programs to be adapted to the needs of individual tribes; and, fourth, the historically conflictual relationship which has existed between tribal authorities and many state and local governments is a significant impediment to the success of any state-local controlled program.

In order to facilitate direct participation in federal social welfare programs certain barriers, both statutory and practical, must be overcome. The enabling legislation of federal programs often presents a statutory barrier to direct participation by tribal authorities because the standard federal-state-local

grant systems are mandated.[58/] Generally, the eligibility of tribal governments to be prime sponsors for federal domestic assistance programs should be specified by statute and, thereby, clarify the present situation where there is considerable variance between programs and agencies. Federal grant programs which require matching funds fail to take into account the lack of financial resources available to Indian tribes. In order to obtain loans, tribes must seek Bureau of Indian Affairs' approval if trust land is offered as collateral, thus, perpetuating Bureau control over tribal actions. Federal grants which have formulas based on minimum population fail to take into consideration that it is the smaller tribes that often are the most needy and suffer when allocations are made on the basis of population. Lack of information on available federal funding is a major barrier to participation by tribal authorities. Although several federal agencies which provide services to Indians are supposed to act as "clearinghouses" for information and provide assistance in obtaining funding,

---

58/ H.R. 3434 - "Adoption Assistance and Child Welfare Act of 1979" is proposed legislation which is the first initiative to amend the Social Security Act. It would provide for direct funding to tribal organizations for child welfare services under Title IV B.

in practice, the federal bureaucracy, itself, is an obstacle to participation. While this is a problem for state and local governments, it is a barrier much more acutely affecting tribal governments.

CONCLUSION

The relationship of Indians and states has historically been conflictual and, to a great extent, it is a result of the Indians' unique legal status. States have received jurisdiction piecemeal from the federal government. Federal policy has vacillated and legal and social issues have remained unsettled often producing litigation between state and local governments and tribal authorities.

Both states and Indian authorities recognize that it is to their mutual advantage to resolve areas of conflict. In order for state social welfare programs to be responsive to the needs of Indian citizens, tribal authorities must be involved as equals in the planning and administration. State and tribal governments should work together to obtain adequate federal funding for Indian social welfare services. Direct funding to tribal authorities would significantly reduce Indian-state conflicts and insure that programs are culturally

responsive to tribally-determined needs. Tribal and state governments should negotiate directly on legal and jurisdictional disputes. Contracts and cooperative intergovernmental agreements should be used to provide maximum use of facilities where tribal governments do not have the financial or administrative resources to establish their own. There is no single solution to existing problems in Indian-state relations. Relations between states and their Indian citizens vary greatly and, therefore, solutions must be worked out on the community level.